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A P P E A R A N C E

FOR THE PLAINTIFF:

FOR THE DEFENDANT:

FOR INTERVENOR WASH

Proceedings recorded by mechanical stenography produced by computer-aided transcript

OFFICIAL COURT REPORTER: KATHRYN M. FRENCH, RPR
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very careful about deciding cases such as this by virtue of applying their own values or determinations as to how there should be perhaps reasonable accommodation for everyone involved. But in many instances, those decisions are left to the administrative bodies, or to the executive branch, as long as there's not a violation of the constitution, and as long as the actions are not arbitrary and capricious, and the foundation for the decision is supported in the record.

So having said that, I'll enter the following findings and conclusions:

First, the standard for summary judgment, and these are cross-motions for summary judgment as well set forth in the Federal Rules of Civil Procedure 56, and I'm not going to restate that. The parties addressed the standards comprehensively in the pleadings.

The facts really are not tremendously in dispute. It's the conclusions reached by the Forest Service that gives rise to this litigation.

Essentially, there are two issues raised in the motions and cross-motion for summary judgment. The first is whether or not the action of the Forest Service, in its record of decision, violated the Establishment Clause of the First Amendment.

The second issue is whether or not under the terms of the Administrative Procedure Act, the action of the

Forest Service was arbitrary and capricious, and not supported by the record.

Many of these cases seem to turn, at least the ones that were cited by the parties, seem to turn on the issue of standing. That's conceded in this case. I'm not going to address it, other than indicate that even if it hadn't been conceded, the Court would have concluded that the plaintiff meets all of the essential elements of standing.

Plaintiff's I think appropriately showed that they've suffered an injury in fact, that's concrete and particularized, actual and imminent, and that there was a causal connection existing between plaintiff's injury and the defendant's conduct, and the injury could be redressed by a favorable decision of the court. So, each of those prongs was met. Apparently, based upon the pleadings and also the statement by counsel for the government here today, that the standing issue is conceded.

And as I indicated, some of the cases that were cited, particularly the Bear case, which is Bear Lodge Multiple Use Association versus Babbitt, 2 Fed.Supp 2.d 1448, affirmed on appeal, 175 F.3d 814, Tenth Circuit decision, 1999, that decision affirmed on appeal dealt, at least on appeal, strictly with the issue of standing, and I don't think is particularly instructive in terms of the final conclusion here; particularly, because of the singular nature of the

issue that was addressed on appeal, which was a standing issue.

Addressing, first, the Establishment Clause argument that's been made by the plaintiff in their motion, that the conduct of the Forest Service violates the First Amendment, the prong set forth in Lemon are the ones the Court has to address: First, whether or not it -- the action of the Forest Service had a secular purpose;

Second, whether or not its principal or primary effect was to advance or inhibit religion; and

Finally, whether or not the action of the Forest Service fosters excessive governmental entanglement with religion.

I spent some time here in trying to glean from each side the arguments with respect to the secular prong. The secular purpose prong, as far as I can determine, means that the government should be prohibited from intentionally acting to promote a particular viewpoint in religious matters. And that's what has been pronounced by the Supreme Court.

The secular purpose prong does not mean that government conduct must be completely unrelated to religion, as that would, as Supreme Court has indicated, exhibit a callous indifference to religious groups. And that's not required. And that's The Corporation of Presiding Bishops for the Church of Jesus Christ of Latter Day Saints versus Amos,

43 U.S. 327, 335, a 1987 decision.

The Supreme Court has also articulated that activity, in order to fail the secular purpose prong, t must be no question that the government activity was mc wholly by religious considerations. And that's an impc factor in this case. And that was set forth in the Lyr versus Donnelly case, 465 U.S. 668.

Finally, in Wallace versus Jaffree, J-a-f-f-r 472 U.S. 38, the Supreme Court held that courts must de whether the government's actual purpose is to endorse c disapprove of religion. When a court may discern a pla secular purpose from the face of the government conduct court should be reluctant to find that such conduct vic the secular purpose prong of the Lemon Test.

Now, applying that to the facts of this case as have been developed in the record, under the Nationa Register's criteria and consideration guidelines, prop used for religious purposes shall not be considered el for the National Register unless the property derives significance from historical importance. And that's s in 36 CFR Section 60.4.

Of some significance in this case, although would not always obviously be dispositive on this poin and it's not dispositive on the point here in the case the Court, both the Forest Service and Keeper of the N

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The forest Service has also determined that rock climbing, by its nature, alters the physical integrity of Cave Rock. And, again, that's true with respect to the cracks in the rock and the items that have been used in the rock, it adversely affects Cave Rock, potentially adversely affects Cave Rock's National Register eligibility, as I've articulated earlier.

Therefore, the Court concludes that the record does not support the plaintiff's position that the Forest Service's actions were motivated wholly by consideration of the Washoe Tribe's religion. It appears, instead, that the evidence is substantial that the Forest Service was motivated by its desire to protect the historical and cultural integrity of Cave Rock.

And as I've indicated, preserving and protecting the historically significant site has a important secular purpose, and the evidence supports this conclusion. It's an important site for the Washoe history. It's an important site for the Washoe culture, for Euro-American history, and natural history.

For those reasons, the Court concludes that the defendant, the Forest Service, has shown that there is a secular purpose, and that there has not been a violation under the first prong of the Lemon's Test.

The second prong is the primary effect. Particular attention has to be paid to whether the government's conduct has the purpose or effect of endorsing religion. The government, however, may accommodate religious practices without violating the Establishment Clause. And I think that's what's critical in this case.

I don't think there's any question that part of the purpose of what the Forest Service is doing here, as I look at the entire record, has the effect of promoting religion, and may have the effect, particularly when you look at the record as its been developed with the public comment, the comment from the Washoes, there's no question that an effect of what the Forest Service has done here promotes religion. But the critical point I think is, and I'm not persuaded by the plaintiff's argument to the contrary, the critical point is that the government may accommodate religious practices without violating the Establishment Clause. The Establishment Clause does not require governments to ignore the historical value of religious sites. That's the case that was cited by counsel, the Cholla versus Civish, C-i-v-i-s-h case, which is 382 F.3d 969 at 976, a Ninth Circuit decision, 2004.

Many of the historical properties have significant religious importance because of the central role religion plays in society. And I'm paraphrasing from that decision.

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excessive entanglement with religion, because Nati
tribes are not solely religious in character or pu
Rather, they are ethnic and cultural in character
Again, quoting from the Cholla case at page 977.

Access has alleged here that the Forest
has directly entangled itself with the Washoe Tril
through the future management of Cave Rock. I'm n
by that argument. First, the majority of the Cave
situated on Forest Service land and the Forest Se
already burdened with the responsibility of manag
Rock.

Second, enforcing the FEIS prohibitions
Service does not excessively entangle itself with
Instead, the Forest Service entangles itself with
and preserving a culturally and historically sign
site.

As I've indicated before, any entanglem
the Washoe Tribe's religion appears to this court
necessary consequence of what is occurring here,
dominant factor. Therefore, the Court concludes
excessive standard has not been met here, and tha
plaintiff has failed to establish that there has

violation of the First Amendment.

In directing the Court's attention to the Administrative Procedure Act, the plaintiff has raised a point that clearly gave the Court some pause in connection with an examination of the record here. It is somewhat troubling to the Court that there was not public comment allowed, that when the Alternative Six was proposed that the Forest Service did not open this up again for public comment. I'm always troubled when that doesn't occur. But, again, the Court has to apply the standards for review of the administrative procedures under the Administrative Procedure Act.

In reviewing the record, it does appear to the Court that Alternative Six, which was proposed, is a combination of alternatives Three, Four and Five. Alternative Six referred to the maximum and immediate protection of heritage resources. And Alternatives Three, Four and Five refer to the phase-out of sports climbing over a six-year period. And Alternative Four was the exclusive Washoe use. And Alternative Five was a phase-out climbing over a three-year period.

It appears to the Court that the Forest Service intended to combine those alternatives and, therefore, legally, would not have been required to give any further notification in reaching a conclusion that was reached

ultimately and incorporated in what's denominated as Alternative Six.

What the service did do, however, was to allow 120 days for comment on the FEIS, and during that time it received substantial comment from, in excess of a thousand individuals. It appears clear to the Court that there was ample opportunity for those who had an interest in what was being proposed with respect to the site, to express themsel and to provide appropriate comment for a final decision by Forest Service. I know there was one citing of the letter here today, with the individual's interpretation of what th Forest Service intended with respect to the comment period. didn't find that persuasive in connection with the fact tha as suggested by the plaintiffs, that the decision had alrea been made. I don't think there's any question that the Forest Service was focusing on Alternative Six, which was a combination of three other alternatives that had been proposed, or they wouldn't have given additional public comment.

Now, plaintiff has suggested that without the protests that were filed, this additional comment period would not have been provided. I don't think that's fatal to the Forest Service's position. It would be nice if they would provide that type of comment, without the necessity o having protests filed and then responding but, in any event

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clearly embodied within the considerations given in the initial notice and hearing period.

After comparing the DEIS and before preparing the FEIS, an agency must consider all the comments that it has received. One possible response is to modify alternatives, including the proposed action. And that is permissible under section 1503.4(a)(1) of 4 CFR

A supplemental EIS is not required for every change. It is not uncommon for changes to be made in an FEIS after receipt of comments on the DEIS and further concurrent studies. Ninth Circuit decision, Idaho -- The Kootenai Tribe of Idaho versus Veneman 313 F.3d 1094 to 1118, a 2002 decision.

Plaintiff also contends the ROD is arbitrary and capricious because it bans climbing while allowing activities such as hiking, walking, fishing and picnicking. In reviewing agency decisions, the court, as I've indicated before, may not substitute its judgment for that of the agency.

Here, the Forest Service states that Alternative Six is the alternative that would both preserve public access to Cave Rock, and eliminate activities that have an adverse affect on the integrity of the rock, and have an adverse affect on Cave Rock's eligibility to continue in the National Register. And all those are supported by the record.

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the legal standard. The issue and legal standard is whether or not in selecting that date, the Forest Service acted arbitrarily and capriciously. And based upon this record, the Court cannot conclude that that was not a significant date, and that the Forest Service acted arbitrarily and capriciously in selecting that date.

For all of those reasons, the Court concludes that the decision of the Forest Service in banning rock climbing was not arbitrary and capricious;

That the parties were given a full and fair opportunity to voice their concerns about the decision-making process, and express themselves with respect to what alternatives should be selected. The granting of the additional 120-day period for comment met the standards of the Administrative Procedure Act. It did not violate due process.

The Court therefore concludes that the arguments of the plaintiff that the Administrative Procedure Act has been violated by virtue of the process undertaken by the Forest Service is not well-founded.

For the reasons that I have set forth, which will constitute conclusions of law and findings of fact, to the extent I've called them conclusion of law or findings of fact erroneously, one will be denominated as the other, this will constitute the decision of this court.

The defendant's motion for summary judgment on behalf of the Forest Service, The United States Department of Agriculture, is granted.

The plaintiff's motion for summary judgment on behalf of the Access Fund is denied.

The request to intervene, motion to intervene, which is document number 25, is denied without prejudice to permit the Washoe Tribe, if it wishes to do so, to file an amicus brief in the event leave is granted by any appellate court to the Tribe to do so. It is so ordered.

Thank you very much counsel,

MR. SMITH: Thank you, Your Honor.

(Court adjourned.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Kathryn French — 2.10.05

KATHRYN M. FRENCH, RPR, CCR — DATE